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**Complainant,**

**v.**

**Docket No. NOR 42121**

**Defendant.**

Complainant, TOTAL PETROCHEMICALS USA, INC. ("TPI"), hereby replies in opposition to the "Motion to Redesignate" filed by CSX Transportation, Inc ("CSXT") on May 17, 2011 ("Motion").<sup>1</sup> CSXT's Motion seeks to redesignate as "Confidential" certain workpapers and exhibits that TPI has designated as "Highly Confidential" in its Opening Market Dominance Evidence, filed on May 5, 2011. The information at issue is TPI Exhibit II-B-9, which is a customer e-mail, and {{ [REDACTED] }}<sup>2</sup> in TPI's electronic workpapers. For the reasons stated herein, the Board should deny CSXT's Motion. However, if the Board

' TPI concurs in CSXT's request for an expedited decision. TPI has no interest in seeing the procedural schedule strung out even more than it already has been, and is very concerned that CSXT's over-reaching Motion is little more than a ploy to buy more time to reply to TPI's Opening Market Dominance Evidence. In order to minimize the opportunity for CSXT to use this Motion as a delay, TPI has been very responsive to CSXT's correspondence on this subject. Although CSXT's first letter to TPI on Friday, May 6, 2011, asked TPI to respond by Wednesday, May 11, TPI responded on Monday, May 9th. CSXT did not send its second letter to TPI until four days later, on Friday, May 13th, to which TPI responded the very same day.

<sup>2</sup> Information in {{ double brackets }} has been designated "HIGHLY CONFIDENTIAL" pursuant to the protective order.

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should grant CSXT's Motion, TPI requests that the Board first afford TPI the option of withdrawing material from the record as an alternative to disclosing it to CSXT personnel.

CSXT's Motion is based upon two principal arguments. First, CSXT contends that the information designated as "Highly Confidential" is not the type of "commercially sensitive" information that is protected by Paragraph 2 of the Protective Order in this proceeding, served June 23, 2010. Second, CSXT contends that its ability to respond to TPI's Opening Market Dominance Evidence is substantially prejudiced by TPI's "Highly Confidential" designations. CSXT places substantial emphasis on its second contention in a transparent attempt to compensate for the weakness of its first. Neither contention is accurate.

**I. TPI HAS PROPERLY DESIGNATED THE ISSUE MATERIAL AS "HIGHLY CONFIDENTIAL" DUE TO ITS COMMERCIAL SENSITIVITY.**

Paragraph 2 of the Protective Order defines as "Highly Confidential" material that contains "specific rate, traffic, or cost data or other competitively sensitive information." Throughout its correspondence with TPI on this subject, CSXT has limited this definition to the examples of "specific rate, traffic or cost data" to contend that the e-mail and {{ [REDACTED] [REDACTED] }} have been improperly designated, while completely ignoring the inclusion of "other competitively sensitive information." See Motion at 6-7 and Exhibits C and F.

It is hard to imagine any subject that is more competitively sensitive to TPI than {{ [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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[REDACTED] }} This Board respects the interests of non-parties to a proceeding in maintaining the confidentiality of their information. See STB Docket No. AB-515 (Sub-No. 2), Central Oregon & Pacific R.R., Inc.—Abandonment and Discontinuance of Service—In Coos, Douglas, and Lane Counties, OR, slip op. at 5 (served Aug. 15, 2008) (“Central Oregon”).

{{ [REDACTED] }} also contain information that is commercially sensitive to TPI in its relationship with CSXT. They would reveal to CSXT reasons that it may not already know as to why trucks are not a viable competitive alternative.<sup>4</sup> For example, CSXT personnel are not likely to know which case customers purchase off-grade product from TPI, { [REDACTED] } or have insufficient storage capacity. That is why TPI has designated as “Highly Confidential” only those portions of its Opening Evidence that linked specific case lanes to these subjects, while otherwise still providing a full discussion of those subjects outside of the “Highly

<sup>3</sup> {{ [REDACTED] }}  
[REDACTED] }}

<sup>4</sup> CSXT calls this “Kafkaesque” because it seems to believe that a railroad cannot be market dominant if it doesn’t know why it is market dominant. Motion, Ex. F, p. 2. The only thing “Kafkaesque,” however, is the fact that the same counsel to CSXT in this proceeding recently argued to the STB, in Docket No. 42125, E.I. du Pont de Nemours and Company v. Norfolk Southern Railway Company, that market dominance is “solely” an objective standard that does not depend upon what a railroad subjectively thinks. See “Norfolk Southern Railway Company’s Reply in Opposition to Motion to Compel of E.I. du Pont de Nemours & Company,” p. 5 (filed April 25, 2011). Of course, there are both objective and subjective elements to market dominance, and CSXT’s counsel was correct, in Docket 42125, that the objective question is whether there is an effective competitive alternative, not whether the railroad knows how or why an alternative may or may not be effective.

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Confidential” designation. See TPI Opening Evidence, pp. II-B-15 to 27.<sup>5</sup> If the Board were to permit CSXT personnel to review {{ [REDACTED] }}, it would unavoidably reveal much of this commercially sensitive information. This proceeding is about the reasonableness of CSXT’s rates, not a tutorial to educate CSXT on the facts that enable it to exercise market dominance over TPI in each individual case lane.

### II. CSXT IS NOT PREJUDICED BY TPI’S “HIGHLY CONFIDENTIAL” DESIGNATIONS.

In an effort to overcome the weakness of its claim that TPI has wrongly designated the issue material as “Highly Confidential,” CSXT alleges that TPI’s designations are highly prejudicial to its ability to respond to TPI’s Opening Market Dominance Evidence.<sup>6</sup> CSXT Motion at 8-10. From the very outset of its correspondence with CSXT on this subject, TPI has expressed its willingness to find some compromise if CSXT could explain how it is prejudiced.<sup>7</sup> Indeed, TPI went to great lengths to explain how CSXT’s counsel could permissibly broach the subject matter of {{ [REDACTED] }} with CSXT personnel consistent with TPI’s

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<sup>5</sup> It is telling that CSXT does not seek to redesignate any of the “Highly Confidential” lane-specific identifications in those other portions of TPI’s Opening Evidence (with the exception of Exhibit II-B-9), which suggests that CSXT’s true motives underlying this Motion are {{ [REDACTED] }} and/or to buy more time to reply to TPI’s Opening Market Dominance Evidence.

<sup>6</sup> See CSXT Motion at 6 (quoting Central Oregon for the proposition that any confidentiality designation must strike an “appropriate balance between legitimate access and legitimate protection.”).

<sup>7</sup> See, CSXT Motion, Exhibit E, p. 2 (“To the extent that you contend CSXT is prejudiced by these designations, please be more specific as to how, so that we can determine if there is an acceptable middle-ground for both TPI and CSXT.”); Exhibit G, p. 4 (“Despite my May 9th invitation for CSXT to more fully explain its supposed prejudice, your letter is loaded mostly with unsupported assertions.”).

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confidentiality designations.<sup>8</sup> CSXT, apparently uninterested in any sort of compromise, has responded with generic assertions and unsupported claims that it repeats in its Motion.

CSXT's prejudice claims take two forms. First, CSXT asserts that its in-house personnel are likely to have knowledge of the information in {{ [REDACTED] }} and that they cannot apply their knowledge without access to that material. Second, CSXT asserts that the prejudice is compounded because {{ [REDACTED] }} are the "only" material that TPI has presented in support of its claim that its customers require rail delivery. None of these claims is accurate.

**A. CSXT Has Not Demonstrated How Its Internal Personnel Are Prejudiced By TPI's Highly Confidential Designations.**

CSXT claims that its "in-house experts likely could offer significant insights into [the highly confidential] documents" because "CSXT personnel are knowledgeable about the transportation markets at issue in this case and regularly deal with the facilities and customers at many of the issue destinations." Motion at 8. CSXT has not offered any specific examples of the subject matter in {{ [REDACTED] }} about which its internal personnel are "likely" to be knowledgeable. Nor, to the extent that CSXT personnel do have such knowledge, has CSXT demonstrated that its in-house personnel need explicit knowledge of {{ [REDACTED] }} in order to address their subject matter.<sup>9</sup>

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<sup>8</sup> See CSXT Motion, Exhibit G, pp. 2-4.

<sup>9</sup> CSXT also suggests that it is unfair for TPI to rely upon its own personnel to sponsor evidence when CSXT cannot. This argument is a red-herring. {{ [REDACTED] }}

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**CSXT offers an impotent excuse for not providing such examples:**

**But it is of course impossible for CSXT to give examples of how its in-house employees could respond to specific allegations without disclosing those allegations to in-house personnel.**

Motion at 9. That argument is not credible because TPI has not designated the allegations as “Highly Confidential,” only the lanes to which just some—not even all—of the allegations refer. Therefore, CSXT should be able to state whether and to what extent its internal personnel have knowledge of subjects such as whether a customer purchases off-grade product, { [REDACTED] } or has adequate storage for its needs, without disclosing the source of those allegations.

**Moreover, CSXT has overlooked Paragraph 9 of the Protective Order, which states:**

Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding. [underline added]

Therefore, to the extent that CSXT personnel have independent knowledge of any subject matter  
 {{ [REDACTED] }}, CSXT's counsel is free to discuss that subject matter with  
 internal personnel. In addition, CSXT's counsel may pose general questions {{ [REDACTED]  
 [REDACTED] }} to CSXT personnel in order to determine the scope of their  
 knowledge, {{ [REDACTED]. }} They are not free, however, to  
 disclose that {{ [REDACTED]  
 [REDACTED] }}

{{ [REDACTED]

[REDACTED]

[REDACTED]

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\_\_\_\_\_}} TPI shared this information with CSXT in its May 13th letter and offered to provide any additional clarification if CSXT believed such clarification was needed, but CSXT's response was to file this Motion.

Notwithstanding CSXT's inferences to the contrary, TPI would not require CSXT's counsel to raise all eighteen subjects for all 158 customer locations with CSXT's internal personnel in order to comply with the "Highly Confidential" designation. See, Motion at 9-10. CSXT counsel is free to ask CSXT's internal personnel about their knowledge of any subject matter {{ [REDACTED] }}, or subset thereof, to any customer destination, or subset thereof, without inquiring about all of them. CSXT is not permitted to disclose {{ [REDACTED] [REDACTED] }} The key factor is that CSXT counsel initiate their questions in a neutral fashion as described in Exhibit 1.

**B. CSXT Mischaracterizes TPI's Case As Depending Almost Entirely Upon the Highly Confidential Material.**

In an effort to further demonstrate prejudice, CSXT mischaracterizes TPI's Opening Market Dominance Evidence by asserting that {{ [REDACTED] }} are TPI's "only evidence" (Motion at 2, 10) or its "primary evidence" (Id. at 4) of customer requirements, and that "nearly all lane-specific allegations [that TPI's customers require rail delivery] are designated "Highly Confidential" (Id. at 3).<sup>10</sup> Those are trumped up claims to portray a prejudice where none exists.

TPI's evidence that its customers require rail delivery is far more extensive than {{ [REDACTED] [REDACTED] }} TPI has openly declared that all of its customers require rail cars for storage, and has identified which customers use TPI's product in medical applications, which lanes involve very high volumes, which destinations are third-party processors or compounders,

<sup>10</sup> CSXT's inconsistent descriptions of {{ [REDACTED] }} as the "only" and then the "primary" evidence are indicative of how much CSXT strains the facts to claim prejudice.

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which destinations are leased tracks, and which destinations are customer-selected facilities where the customer is responsible for the subsequent transportation. In addition, TPI presented five years of shipment data to demonstrate that, when its customers have a choice between rail or truck, they consistently and overwhelmingly have chosen rail. The only lane-specific information that TPI designated "Highly Confidential" in its discussion of customer requirements is the identification of { [REDACTED] } off grade customers, contracts that require rail transportation, and {{ [REDACTED] }  
[REDACTED]  
[REDACTED] }}

It is quite telling that the only example CSXT provides of TPI designating most of its lane-specific market dominance evidence as “Highly Confidential” is Lane B-14. Motion at 3. Referring to page II-B-58 of TPI’s Opening Evidence, CSXT asserts that TPI designated four of the five reasons why CSXT possesses market dominance over Lane B-14 as highly confidential, “thus shielding them from review by the allegedly market dominant carrier.” Those five reasons are:

- The customer's preference for rail is consistent with a low volume of truck deliveries. The only highly confidential information is precisely how low.
- Direct truck rates are higher. The only highly confidential information is precisely how much higher.
- Transload costs are higher. The only highly confidential information is precisely how much higher.
- The cumulative 4-year increase in CSXT's rates. None of this is highly confidential.
- {{ [REDACTED] }}

If this is the best example of prejudice that CSXT can present out of 105 case lanes, it has failed woefully to demonstrate prejudice.

Finally, CSXT's due process argument carries no weight. CSXT has failed to demonstrate that its internal personnel are in any position to respond to the subject matter in



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{{ [REDACTED] }}, much less in the “best” or “only” position. As noted herein, there are many ways for CSXT personnel to apply whatever knowledge they possess of those subject matters. Moreover, CSXT has engaged an expert witness from the polymer industry who is in a position to review and respond to all highly confidential information. CSXT has not demonstrated why its expert cannot protect its due process interest. The fact that CSXT merely tosses out the term “due process” at the end of its Motion based upon trumped up allegations falls far short of raising a genuine due process concern.

**III. A WHOLESALE REDESIGNATION OF THE ENTIRE CONTENTS OF THE ISSUE MATERIAL IS NOT APPROPRIATE, AND TPI SHOULD BE PROVIDED THE OPTION OF WITHDRAWING ANY REDESIGNATED MATERIAL FROM THE RECORD.**

If the Board decides that TPI’s commercially-sensitive concerns do not warrant the “Highly Confidential” designation, it would not be appropriate to redesignate this material on a whole-sale basis. The documents still contain subsets of information that are indisputably “Highly Confidential.” For example, {{ [REDACTED] [REDACTED] }} is a matter of contract between TPI and its customer, which is “Highly Confidential.” CSXT itself has acknowledged that the “Highly Confidential” designation is appropriate for TPI’s sales contracts. Motion at 3.

Furthermore, if the Board redesignates the confidentiality of any of these documents, TPI requests that the Board give TPI the option to withdraw a portion, or all, of the material from the record. TPI made its “Highly Confidential” designations in good faith and the option to withdraw material from the record may be necessary {{ [REDACTED]


[REDACTED]

[REDACTED]

[REDACTED] }}

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Respectfully submitted,

A handwritten signature in dark ink, appearing to read "David E. Benz", is written over a horizontal line.

Jeffrey O. Moreno

David E. Benz

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May 19, 2011

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Exhibit 1: {{ [REDACTED] }}

[REDACTED]

[REDACTED]

[illegible]

[REDACTED]

\_\_\_\_\_

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>11</sup> TPI inconsistently designated this information as "Highly Confidential" on page II-B-23 of its Opening Evidence, but as Public in the Part II-B-4 Lane Summaries. TPI hereby redesignates all of the "Highly Confidential" information on page II-B-23 as "Confidential."

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

18. [REDACTED]

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<sup>12</sup> TPI inconsistently designated this information as "Highly Confidential" on page II-B-24 of its Opening Evidence, but as Public in the Part II-B-4 Lane Summaries. TPI hereby redesignates the first "Highly Confidential" designation on page II-B-24 as "Public."

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[REDACTED] }

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**CERTIFICATE OF SERVICE**

I hereby certify that this 19th day of May 2011, I served a copy of the foregoing upon CSXT in the following manner and at the addresses below:

**Via e-mail and first-class mail to:**

G. Paul Moates Paul Hemmersbaugh Sidley Austin LLP 1501 K Street, NW Washington, DC 20005  pmoates@sidley.com phemmersbaugh@sidley.com  <i>Counsel for CSXT</i>	
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David E. Benz